NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. TERRANCE FOWLER, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1330 WDA 2013

Appeal from the PCRA Order July 17, 2013,
Court of Common Pleas, Erie County,
Criminal Division at No. CP-25-CR-0002536-2010

BEFORE: FORD ELLIOTT, P.J.E., DONOHUE and PLATT*, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED MARCH 3, 2014**

Terrance Fowler ("Fowler") appeals *pro se* from the July 17, 2013 order denying his petition filed pursuant to the Post Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-9546 ("PCRA"), without a hearing. After careful review, we affirm.

The evidence adduced at trial is as follows. Aleksandr Cheremnykh testified that on July 7, 2010, he owned and was working at a jewelry store when two masked men came in wielding guns. One pointed a handgun at him and ordered him to open the safe. When he refused, the perpetrator shot him in the chest. The two men took several silver certificates and keys to the display shelves.

Bruce Wagner, who lived around the corner from the jewelry store, testified that at approximately 10:50 a.m. on July 7, 2010, he observed

*Retired Senior Judge assigned to the Superior Court.

Fowler, who was driving a green four-door car, park near his house. Fowler and his accomplice walked in the direction of the jewelry store, and returned to the car roughly 10 minutes later and drove away. Fowler and his accomplice returned five minutes after that and again parked in about the same spot. The men again walked in the direction of the store. When the men walked away, Wagner ran out of his house and wrote down the license plate number on the car. The men came running back to the car approximately 15 minutes later and again drove away from the area.

Wagner turned on his scanner and learned the nearby jewelry store had been robbed. He flagged down a police officer he saw driving by in a marked cruiser and gave the officer his written description of the men he saw and their vehicle. The officer looked around the area and found a five-dollar silver certificate in the area where the car had been parked.

Police went to Fowler's house on July 7, 2010 at approximately 1:00 p.m. They observed a green four door vehicle in the driveway bearing the same license plate number that Wagner had reported. When asked, Fowler told police that he had been in control of the car all day.

Fowler's father, James Fowler, testified that he and Fowler shared a residence. According to James Fowler, Fowler left the house between 8:00 and 8:30 a.m. to take his fiancée to work and daughter to daycare. Although he was not certain, he did not believe he was gone for more than an hour. He further testified that when the police came to the house, Fowler had only been home for less than an hour. Fowler's cousin, Tabet Vaughn, testified that Fowler has a reputation for being "peaceful, quiet and loving, good family guy." N.T., 7/15/11, at 63.

Following the two-day trial, a jury convicted Fowler of attempted homicide, aggravated assault, conspiracy to commit robbery, and possessing instruments of crime. On September 13, 2011, Fowler filed a post-trial motion challenging the weight and sufficiency of the evidence to support a conviction, which the trial court denied. On September 20, 2011, the court sentenced Fowler to an aggregate term of 27½ to 55 years in prison. Fowler filed a post-sentence motion on September 28, 2011, seeking a reduction of sentence, which the trial court denied on October 10, 2010.

On direct appeal, counsel for Fowler filed an ***Anders***[1] brief and a motion to withdraw, asserting that the appeal was wholly frivolous. On June 1, 2012, this Court affirmed Fowler's judgment of sentence and granted counsel permission to withdraw.

On April 16, 2013, Fowler filed a timely *pro se* petition for PCRA relief. The PCRA court appointed counsel, who filed a supplemental PCRA petition on Fowler's behalf.[2] The Commonwealth filed its response on June 20, 2013.

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[1] ***Anders v. California***, 386 U.S. 738 (1967); ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009).

[2] We note that appointed counsel raised no additional issues on Fowler's behalf. To the contrary, although not styled as or apparently intended to be a ***Turner/Finley*** petition, appointed counsel inexplicably included a paragraph arguing against one of the issues raised by Fowler in his *pro se*

On June 21, 2013, the PCRA court filed notice of its intention to dismiss Fowler's PCRA petition without a hearing pursuant to Pa.R.Crim.P 907(1) ("Rule 907"), based on its conclusion that all claims raised therein were meritless. Fowler filed a response objecting to the Rule 907 notice on July 8, 2013. The PCRA court ultimately dismissed Fowler's PCRA petition on July 17, 2013.

Fowler filed a timely counseled notice of appeal on August 13, 2013. On September 18, 2013, Fowler filed a motion in this Court requesting to represent himself on appeal. In response, we remanded the record to the PCRA court to hold a hearing pursuant to ***Commonwealth v. Grazier***, 552 Pa. 9, 713 A.2d 81 (1998), to determine whether Fowler's waiver of his right to counsel was knowing, voluntary and intelligent. On October 15, 2013, following the ***Grazier*** hearing, the PCRA court granted Fowler's request to proceed *pro se*.

On appeal, Fowler raises the following issues for our review:

> A. Was [Fowler] denied his right to effective assistance of counsel in violation of Article I § 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel failed to request an alibi instruction after presenting alibi evidence[?]
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> B. Was [Fowler] denied his right to effective assistance of counsel in violation of Article I § 9 of the Pennsylvania Constitution and the Sixth and

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PCRA petition. ***See*** Supplemental Motion for Post Conviction Collateral Relief, 5/20/13, at ¶ 6.

> Fourteenth Amendments to the United States Constitution when trial counsel failed to file a motion to suppress the prosecution[']s key witness['] in-court identification[?]
>
> C. Was [Fowler] denied his right to effective assistance of counsel in violation of Article I § 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel failed to request a[] curative instruction when the prosecutor admitted prejudicial evidence into trial[?]
>
> D. Was [Fowler] denied his right to effective assistance of counsel in violation of Article I § 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel failed to request a ***Kloiber*** instruction[?]

Fowler's Brief at vi.

"Our standard of review for an order denying post-conviction relief is whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. The PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record." ***Commonwealth v. McDermitt***, 66 A.3d 810, 813 (Pa. Super. 2013) (internal citations omitted). When a PCRA petition has been dismissed without a hearing, "[a] reviewing court must examine the issues raised in the PCRA petition in light of the record in order to determine whether the PCRA court erred in concluding that there were no genuine issues of material fact and in denying relief without an evidentiary hearing." ***Commonwealth v. Springer***, 961 A.2d 1262, 1264 (Pa. Super. 2008) (citation omitted). "Our scope of review is limited to the findings of the PCRA court and the evidence of record, viewed in the light most favorable to the party who prevailed in the PCRA court proceeding." ***Commonwealth v. Elliott***, __ Pa. __, 80 A.3d 415, 427 (2013).

All of the issues raised on appeal challenge the effectiveness of trial counsel's representation. It is well-settled law that we presume counsel provided effective assistance. ***Commonwealth v. Sepulveda***, __ Pa. __, 55 A.3d 1108, 1117 (2012).

> To establish ineffectiveness, a petitioner must plead and prove the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. Counsel's actions will not be found to have lacked a reasonable basis unless the petitioner establishes that an alternative not chosen by counsel offered a potential for success substantially greater than the course actually pursued. Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different.

Commonwealth v. Brown, 48 A.3d 1275, 1277 (Pa. Super. 2012), *appeal denied,* __ Pa. __, 63 A.3d 773 (2013) (citation omitted). "If a petitioner fails to prove any of these prongs, his claim fails." ***Commonwealth v. Simpson***, __ Pa. __, 66 A.3d 253, 260 (2013) (citation omitted).

As his first issue on appeal, Fowler argues that trial counsel was ineffective for failing to request that the jury be given an alibi instruction. Fowler's Brief at 6-11. He asserts that the robbery in question occurred at

11:30 a.m. and that his father, James Fowler, provided testimony that proved that Fowler was home at that time. ***Id.*** at 6-8. Although trial counsel provided notice of an alibi defense, he failed to request that the trial court instruct the jury regarding the significance of his alibi defense. Addressing all three prongs of the ineffectiveness test, Fowler contends that trial counsel was ineffective for failing to do so. ***Id.*** at 10-11. The PCRA court found "there was insufficient evidence as a matter of record to entitle [Fowler] to an alibi instruction, and therefore counsel cannot be ineffective for failing to raise a meritless issue." PCRA Court Opinion and Notice of Intent to Dismiss PCRA Without a Hearing Pursuant to Pa.R.Crim.P. 907(1) ("PCRA Court Opinion"), 6/21/13, at 1.

"An alibi is a defense that places a defendant at the relevant time at a different place than the crime scene and sufficiently removed from that location such that it was ***impossible*** for him to be the perpetrator." ***Commonwealth v. Sileo***, 32 A.3d 753, 767 (Pa. Super. 2011) (*en banc*) (citing ***Commonwealth v. Collins***, 549 Pa. 593, 702 A.2d 540 (1997)) (emphasis added). "Where such evidence has been introduced, a defendant is entitled to an alibi instruction to alleviate the danger that the jurors might impermissibly view a failure to prove the defense as a sign of the defendant's guilt." ***Commonwealth v. Mikell***, 556 Pa. 509, 517, 729 A.2d 566, 570 (1999).

The record in the case at bar reflects that Fowler's father, James Fowler, provided the following testimony on Fowler's behalf. He stated that Fowler left his home between 8:00 and 8:30 a.m. on July 7, 2010, to take his fiancée to work and his daughter to daycare. N.T., 7/15/11, at 38. He was not paying attention to the clock, but believed Fowler was gone for less than an hour. ***Id.*** at 40. Fowler, however, had told police that he did not drop his daughter off at daycare until 9:45 or 10:00 a.m. ***Id.*** at 50. When confronted on cross-examination about his timeframe not matching with the statement given by Fowler to police, James Fowler reiterated that he was unsure and that he did not "look at the clock or anything." ***Id.*** James Fowler further testified that at the time the police arrived at the house, Fowler had been home less than an hour – "maybe 45, 50 minutes." ***Id.*** at 42. Police testified that they arrived at the house at approximately 1:00 p.m. N.T., 7/14/11, at 107.

The record further reflects that Bruce Wagner ("Wagner") testified to seeing Fowler driving a green vehicle that he parked outside of Wagner's house at approximately 10:50 a.m. on July 7, 2010. N.T., 7/14/11, at 54. Wagner's home is in the same neighborhood as the jewelry store where the robbery occurred. ***Id.*** at 52. According to Wagner, Fowler and his accomplice left and returned to the vehicle approximately 10 minutes later and drove away from the area. ***Id.*** at 55. They returned approximately five minutes after that, parking in the same place, and again exited the vehicle.

Id. at 56. While Fowler and his accomplice were gone, Wagner ran outside and wrote down the license plate number of the vehicle. Wagner testified that Fowler and his accomplice came running back to the car 10 to 15 minutes later and again drove away from the area. ***Id.*** at 58. Wagner turned on his police scanner and learned that the jewelry store in his neighborhood had just been robbed. ***Id.*** Thus, according to Wagner's testimony, Fowler was present in the area where the robbery occurred until approximately 11:20 a.m.

Police were dispatched to the robbery scene at around 11:40 a.m. ***Id.*** at 89. Wagner flagged down one officer to let him know what he observed. ***Id.*** at 94. That officer discovered a five-dollar silver certificate that had been stolen from the jewelry store in the vicinity of where the green car had been parked outside of Wagner's house. ***Id.*** at 96.

Fowler lived roughly 10 minutes from the jewelry store. ***Id.*** at 108. When police arrived, they observed Fowler's car in the driveway – a green vehicle bearing the same license plate that Wagner observed parked outside of his house. ***Id.*** at 112. Fowler told police that he had been in control of the vehicle the entire day up to that point. ***Id.*** at 119.

Our review of the record therefore comports with the PCRA court's finding that Fowler presented insufficient evidence to warrant giving the jury an alibi instruction. James Fowler's testimony did not make it impossible for Fowler to have been the perpetrator of the robbery. ***See Sileo***, 32 A.3d at

767. Indeed, his testimony regarding how long Fowler had been home prior to the arrival of the police placed Fowler out of the home at the time of the robbery. We therefore find no error in the PCRA court's dismissal of this claim without a hearing.

As his second issue on appeal, Fowler asserts that trial counsel was ineffective for failing to file a motion to suppress Wagner's in-court identification. Fowler's Brief at 12-19. He states that the events leading up to the trial resulted in an impermissibly suggestive identification, including:

> 1) that Mr. Wagner never made [a] pre-arrest identification of [Fowler], [TT. 7/14/11, at 76-77]; 2) Mr. Wagner never identified [Fowler] until months after the crime at a preliminary hearing, which was postponed several times and each time Mr. Wagner was made aware that [Fowler] was the individual charged for the crime [TT. 7/14/11, at 80-83]; 3) Mr. Wagner saw [Fowler]'s picture on T.V. in handcuffs, as the person arrested for the crime TT. 7/14/11, at 80]; 4) Mr. Wagner described only the perpetrator[']s clothing, no facial features on the day of the crime, [TT. 7/14/11, at 69] Mr. Wagner was as sure about the identification of Mr. Dixon, [Fowler]'s co-defendant, as he was of [Fowler][, and] [c]ounsel was aware that Mr. Dixon's charges were dismissed for lack of evidence, [TT. 7/14/11, at 83-84]; 6) Mr. Wagner's identification of [Fowler] was from a window 40-50 feet away, [TT. 7/14/11, at 71.].

Fowler's Brief at 13 (record citations in the original). He asserts that counsel could not have had a reasonable strategic basis for failing to suppress the only eyewitness' identification, and details trial counsel's extensive questioning of Wagner regarding the possibility that the events leading up to trial tainted Wagner's in-court identification. ***Id.*** at 14-15, 16, 18. He further argues that the prejudice here is clear, as the charges against Fowler's alleged accomplice were dismissed based upon Wagner's inability to identify him at the preliminary hearing. ***Id.*** at 18.

The trial court found this issue was meritless, as a motion to suppress "would have no basis for success." PCRA Court Opinion, 6/21/13, at 1. Specifically, the trial court found that Wagner "had the opportunity, attention, and ability to observe [Fowler] and was accurate and positive in his identification." ***Id.***

Our Supreme Court has found "that identifications made only after a witness has seen the defendant in the media" constitute an "impermissible suggestive identification." ***Commonwealth v. Carter***, 537 Pa. 233, 253, 643 A.2d 61, 71 (1994), *cert. denied*, 514 U.S. 1005 (1995).

> The problem with an impermissible suggestive identification is the potential for misidentification, resulting in a due process violation if that identification is admitted at trial. Following a suggestive pre-trial identification, a witness will not be permitted to make an in-court identification unless the prosecution establishes by clear and convincing evidence that the identification was not induced by events occurring between the time of the crime and the in-court identification. Thus, an in-court identification following a suggestive out of court identification will be admissible only if, considering the totality of the circumstances, it is determined that the in-court identification had an origin sufficiently distinguishable to be purged of the primary taint.

> In determining whether an independent basis for identification exists, we must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Our scope of review limits our consideration to a determination of whether sufficient evidence has been presented to support the independent basis for the in-court identification.

Id. at 233, 253-54, 643 A.2d at 71 (internal citations omitted).

The record reflects that Wagner identified Fowler for the first time at his preliminary hearing. N.T., 7/14/11, at 78, 80. Between the time of the robbery and the initial identification, Wagner watched a news program that depicted Fowler, in handcuffs, being arrested for the crimes at issue. ***Id.*** at 79-80. The record further reflects that Fowler's preliminary hearing was continued, and on at least one occasion, Wagner saw Fowler at the Magistrate's office and knew he was one of the individuals charged. ***Id.*** at 80-81. Thus, as in ***Carter***, Wagner's subsequent identification of Fowler was an "impermissible suggestive identification." ***Carter***, 537 Pa. at 253, 643 A.2d at 71.

Our review of the PCRA court's opinion reveals that it did not consider all of the prongs of the above-listed test to determine whether Wagner had an independent basis for identifying Fowler as the perpetrator of the robbery. Specifically, the PCRA court failed to consider the accuracy of any prior identifications made by Wagner. This is especially significant because, as noted above, the record reflects that Wagner never identified Fowler prior to the preliminary hearing. N.T., 7/14/11, at 78, 80. Furthermore, Wagner misidentified Fowler's accomplice and testified at the preliminary hearing that he was as certain of his identification of Fowler as he was of his identification of Fowler's accomplice. ***Id.*** at 83-84. The PCRA court likewise did not consider the length of time between the identification and the commission of a crime.[3]

Nonetheless, even assuming that Wagner did not have an independent basis for his identification of Fowler, we cannot conclude that Fowler was prejudiced by counsel's failure to file a motion to suppress the identification. In addition to Wagner's identification of Fowler at the preliminary hearing and at trial, Wagner also testified to the license plate number and a description of the vehicle that the perpetrators of the robbery were driving. ***Id.*** at 54, 61. This was the same vehicle police found when they came to Fowler's home. ***Id.*** at 112. Fowler admitted to police that he was the only person in control of that vehicle on the day of the robbery between 9:30 a.m. and the time the police arrived to speak with him. ***Id.*** at 119.

As there was evidence independent of Wagner's identification of Fowler implicating Fowler as the perpetrator of the robbery, there is no basis for

[3] There is no information in the certified record on appeal pertaining to the preliminary hearing or the date upon which it occurred.

concluding that there is a reasonable probability that the outcome would have been different if counsel had filed a motion to suppress the identification. ***See Brown***, 48 A.3d at 1277. As such, we find no error in the trial court's denial of this claim without a hearing.

Fowler next asserts that trial counsel was ineffective for failing to request a curative instruction when the Commonwealth presented evidence regarding the recovery of a shotgun during a search of Fowler's bedroom. Fowler's Brief at 20-25. Fowler argues that because the trial court excluded the shotgun from evidence based upon its conclusion that the evidence was more prejudicial than probative, trial counsel should have requested a curative instruction regarding the officer's testimony about locating the shotgun in Fowler's bedroom. ***Id.*** at 23. The PCRA court found that counsel was not ineffective, as he "made a timely and appropriate objection as to the shotgun[,] which was sustained, and the evidence was not admitted." PCRA Court Opinion, 6/21/13, at 1. The PCRA court does not address the issue of the testimony concerning the shotgun that preceded the objection and exclusion of the physical evidence.

Once again, however, the record does not support a finding that Fowler was prejudiced by the presentation of testimony regarding the shotgun. As discussed *supra*, the evidence at trial included testimony that Fowler was in the vicinity of the scene of the crime at the time the crime occurred and that proceeds of the robbery were discovered where his car had been parked. ***See supra***, pp. 8-9.

Furthermore, the record reflects that the testimony concerning the shotgun was brief:

> A. We searched the entire bedroom. I found a Mossberg shotgun in between the mattress and box spring of the bed. I found empty a[] pancake holster underneath the bed along with a silver magazine underneath.
>
> Q. Showing you what's marked as Commonwealth Exhibit Number 13. Can you look at that and tell me if you recognize what's in this big box?
>
> A. Yeah, the Mossberg 12 gauge shotgun.
>
> Q. What did you do with this gun after you recovered it?
>
> A. Unloaded it. There was [*sic*] two live shells in it, and then packaged them up.

N.T., 7/15/11, at 16.

Pursuant to our scope and standard of review, we cannot conclude, based on the evidence presented connecting Fowler to the robbery, that the fleeting reference to the shotgun results in a reasonable probability that the outcome of trial would have been different if counsel had requested a curative instruction regarding the above testimony. ***See Elliott***, __ Pa. at __, 80 A.3d 415, at 427; ***McDermitt***, 66 A.3d at 813; ***Brown***, 48 A.3d at 1277. As Fowler was not prejudiced by counsel's alleged failing in this regard, we find no error in the trial court's rejection of this issue without a hearing.

As his final issue on appeal, Fowler states that trial counsel was ineffective for failing to request a ***Kloiber***[4] instruction. Fowler's Brief at 26-30. "A ***Kloiber*** instruction informs the jury that an eyewitness identification should be viewed with caution when either the witness did not have an opportunity to view the defendant clearly, equivocated on the identification of the defendant, or has had difficulties identifying the defendant on prior occasions." ***Commonwealth v. Sanders***, 42 A.3d 325, 332 (Pa. Super. 2012), *appeal denied,* __ Pa. __, 78 A.3d 1091 (2013). Fowler bases his argument on the combination of Wagner's qualification, before misidentifying Fowler's accomplice, that it had been three months since he observed the accomplice and Wagner's testimony that he was as certain of his identification of Fowler as he was of Fowler's accomplice. Fowler's Brief at 27-29. According to Fowler, Wagner therefore equivocated on the identification of Fowler, and counsel thus should have requested a ***Kloiber*** instruction. Fowler's Brief at 29-30.

The PCRA court found this issue to be devoid of merit. It found that "the witness had a clear, unobstructed view of [Fowler], observed [Fowler] on more than one occasion, was sure [Fowler] was the person he saw, and had accurately identified [Fowler] in the past." PCRA Court Opinion, 6/21/13, at 2.

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[4] ***Commonwealth v. Kloiber***, 378 Pa. 412, 106 A.2d 820 (1954).

Our review of the record comports with that of the trial court. We find no support in the record for Fowler's claim that Wagner ever equivocated regarding his identification of Fowler. To the contrary, it is uncontested that Wagner identified Fowler at the preliminary hearing (N.T., 7/14/11, at 83); testified at trial that Fowler "looked right at [Wagner] before he got out of the car the second time" (***id.*** at 59); and that he was "[a]bsolutely positive" that Fowler was the person he saw driving the car on the day in question (***id.*** at 86). As this argument is without merit, we find no error in the trial court's dismissal of this claim without a hearing.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/3/2014